ASSOCIATED TRACTORS SDN. BHD.

v.

CHAN BOON HENG & ANOR.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 02-254-89]
5 JUNE 1990

CONTRACT: *Dispute in respect of agreement relating to harvesting machinery - Guarantee - Counter-claim.*

CIVIL PROCEDURE: *Ex parte injunction to restrain vendors from taking possession*

The plaintiffs (appellants) claimed the sum of RM301,165 being rental due and the estimated value of a harvesting machine. Alternatively they asked for judgment in the sum of RM151,165 being rental and the return of the said machinery. The claim was based on a rental agreement of 31 December 1984.

The defendants (respondents), in their statement of defence and counterclaim, denied that there was any rental agreement. They averred that the machinery was sold to them by the plaintiffs through their agent for RM225,000 of which RM90,000 had been paid.

On 13 July 1988 the plaintiffs (appellants) applied to strike out the defence and the counterclaim on the ground that it was frivolous, vexatious and an abuse of process. On 28 September 1988 the first defendant applied for an *ex parte* injunction to restrain the plaintiffs from taking possession of the machinery. The injunction was granted and on 5 June 1989 it was extended by the Judge to continue until trial of the action. The plaintiffs appealed.

Held:

[1] The granting or withholding of injunction before trial is governed by established principles. All the Court needs to be satisfied is that the claim is not frivolous or vexatious. There is no need for a *prima facie* case test.

[2] As long as the Court is satisfied that there is a serious question to be tried, that will constitute a basis to consider whether on the balance of convenience the injunction should be granted.

[3] The most important factor for the Court to consider is whether damages would be an adequate and proper remedy. In exercising its discretion, the Court acts upon the principle of preventing irreparable damage.

[4] On the facts, the Court considered that damages would be an adequate remedy and therefore the injunction was not properly granted.

[Appeal allowed.]

Cases referred to:
Hubbard v. Vosper [1972] 2 QB 84
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396
Mohamed Zainuddin bin Puteh v. Yap Chee Seng [1978] 1 MLJ 42
London & Blackwell Rly. Co. v. Cross [1986] 31 Ch D 354

Legislation referred to:
Rules of the High Court 1980, O. 14

For the appellants - Mohd. Yusuf Khan; M/s. Yusuf Lee Pathma & Marbeck
For the respondents - Tan Boon Hee; M/s. Tan Teh & Co.

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

We allowed this appeal with costs and now state our grounds.

The appellants/plaintiffs, Associated Tractors Sdn. Bhd., in their statement of claim sought for judgment in the sum of RM301,165 being the total amount of alleged defaulted rentals and the estimated value of a harvesting machine. Alternatively the appellants/plaintiffs sought for judgment in the sum of RM151,165 being the same alleged defaulted rentals and the return of the same said harvesting machine together with interests and costs. The claims were based on a rental agreement dated 31 December 1984 whereby the harvesting machine was let out by the appellants/plaintiffs to the first respondent. The claim against the second respondent was based on a straight forward letter of guarantee relating to the same harvesting machine. Both the rental agreement and the guarantee were exhibited - pp. 76-79 and pp. 81-82 of the appeal record.

The two respondents in their statement of defence and counter claim denied firstly there was any rental agreement. The respondents then averred that the appellants/plaintiffs had through their servant and/or agent sold the same harvesting machine to the first respondent at a total price of RM225,000 of which a sum of RM90,000 had been paid as stated in a document in the form of a Salesman's Order No. 0364 which was exhibited to support the defence.

On 13 July 1988 the appellants/plaintiffs applied by summons in chambers to strike out the counter claim on the grounds that it was frivolous and vexatious and/or an abuse of process. This application was not heard as yet when the first respondent on 28 September 1988 applied for an *ex parte* injunction to restrain the appellants/plaintiffs from taking possession, disposing or interfering with the same said harvesting machine in the possession of the first respondent. An *ex parte* injunction was granted. On 4 June 1989 after hearing both parties the Judge extended the injunction to continue until the trial of the action or until the hearing of the appellants/plaintiffs' application for final judgment under O. 14 of the Rules of the High Court 1980. Thus the present appeal.

The discretion of the Court in granting or withholding injunction before the trial of an action is governed by established principles. These principles have been developed over the years and the position in law now is that all that the Court needs to be satisfied with before exercising the discretion to grant an injunction is that the claim is not frivolous or vexatious. There is no longer a need for the *prima facie* case test. In other words as long as the Court is satisfied that there is a serious question to be tried that will constitute a basis to proceed to consider whether on the balance of convenience the injunction should be granted. See *Hubbard v. Vosper* [1972] 2 QB 84 and *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396.

Many factors can be relevant for consideration at this stage. It is implied in *Mohamed Zainuddin bin Puteh v. Yap Chee Seng* [1978] 1 MLJ 42 that any factor which can tip the balance may be considered and this is referred to at p. 42:

> Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the Court to take into account any tipping in the balance as revealed by affidavits.

The three documentary exhibits in our present case (the rental agreement, the guarantee and the Salesman's Order) would seem to show clearly that there is a serious question to be tried. The Court should not go into the merits at this stage but the three documents on their face value would certainly help to tip the balance one way or the other. Though the defence of *non est factum* was not pleaded the respondents still denied the rental agreement and the guarantee. The Salesman's Order No. 0364 carried with it a number of conditions set out at the back of the order and one of the conditions, that is condition No. 5, is that the client must adhere to the terms of the payment.

It can also be noticed that the Salesman's Order was dated 30 November 1984 i.e. about one month before the dates on the other two documents i.e. 31 December 1984. The rental agreement was executed together with the guarantee. This fact is certainly relevant for consideration.

But it would seem quite clear that the most important factor to consider as a matter of principle is the question of whether in lieu of the injunction damages would be an adequate and proper remedy because in the matter of injunctions and exercising its jurisdiction the Court acts upon the principle of preventing irreparable damage. As Lindley LJ said in *London & Blackwell Rly. Co. v. Cross* [1986] 31 Ch D 354 at p. 369:

> The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy.

The respondents in their counter claim sought for the return of the RM90,000 as the sum allegedly paid towards the purchase of the machine and damages and interests. It is clear therefore that this is a case where even holding the defendants to their counter claim damages would be an adequate remedy. Therefore the injunction was in our view not properly granted. In a case like this it would be more appropriate to order an early hearing of the application to strike out the counter claim and the application for summary judgment rather than to grant the injunction.

Also found at [1990] 2 CLJ 157